6214.

WATER AND LIGHT RENTALS—LIEN ATTACHES AGAINST REAL ESTATE OF OWNER WHERE WATER AND LIGHT SUPPLIED—WHEN VILLAGE BOARD OF TRUSTEES OF PUBLIC AFFAIRS CERTIFIES DELINQUENT RENTALS TO COUNTY AUDITOR—PROVIDING NOTICE GIVEN OWNER AND RENTS ACCRUED AFTER HE OBTAINED TITLE.

SYLLABUS:

1. A village board of trustees of public affairs is not authorized to create a lien, by rule of such board, upon real estate for delinquent water and light rentals for such services supplied to said real estate.

2. A board of trustees of public affairs of a village may legally certify to the county auditor delinquent water and light rentals upon real estate whereupon the county auditor is required to place same upon the tax duplicate for collection and the county treasurer is then required to collect the same as other village taxes.

3. A board of trustees of public affairs of a village may legally certify delinquent water and light rentals, for such services supplied to a tenant, to the county auditor to be collected as other taxes against the real estate occupied by the tenant, providing the owner of the realty has been given due notice of the claim against the real estate prior to certification to the county auditor, and providing such delinquent rentals accrued after the owner of the premises, upon which it is sought to create a lien, obtained the title to the said premises.

COLUMBUS, OHIO, October 17, 1936.

HON. PAUL SPRIGGS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR: Your communication requesting my opinion reads:

> "I write you at the request of the County Auditor and County Treasurer of Paulding County, Ohio.
>
> The Village of Paulding, located in Paulding County, Ohio, has a municipally owned water works and light plant, and a Board of Public Affairs, in accordance with Section 4357, G. C. This Board of Public Affairs has certified its delinquent rentals for electric light and water to the County Auditor to be collected as real estate taxes, and the County Auditor has placed the same on the tax duplicates of said county. We are familiar

with No. 1203 of the 1929 Opinions of the Attorney General as well as No. 2636 of the 1934 Opinions of the Attorney General. Since the latter opinion was rendered many persons of the Village of Paulding have been advised that they do not have to pay the County Treasurer the amounts certified against them as taxes for delinquent light and water rentals, and consequently have not paid this part of their taxes, and have requested the County Auditor as well as the County Treasurer to strike these amounts from the tax duplicate, and for this reason I would like your opinion relative to the following questions:

Question 1: May delinquent water rentals as well as bills for electric power, which are made a lien on the property in accordance with Section 4361 G. C. by rule of the Board of Public Affairs of the Village, be legally certified to the County Auditor for collection as other village taxes are collected?

Question 2: May such delinquent water rentals and delinquent light bills due from a tenant be so certified and collected as taxes from the landlord property owner?

Question 3: In event that the bills are created by a tenant and cannot be made a lien upon the property of the landlord, and collected from him as taxes, under the provisions of 4361, G. C., is the Auditor or Treasurer of the county authorized with the consent of the Board of Public Affairs to strike such amounts so certified by said Board of Public Affairs from the County tax duplicate?"

The opinions to which you refer in your communication, namely, No. 1203 of the 1929 opinions and No. 2636 of the 1934 opinions, are reported in Opinions of the Attorney General for 1929, Vol. III, Page 1788, and Opinions of the Attorney General for 1934, Vol. I, Page 612, respectively. The said 1929 opinion held, as disclosed by the syllabus:

"1. There is no authority for the certification of delinquent water rentals to the county auditor by a city. Neither is there any authority for the county auditor placing such certification upon the tax duplicate for collection.

2. By reason of the express provisions of Section 4361, of the General Code, the board of public affairs of a village may legally certify to the county auditor the delinquent water rentals. Upon such certification, the county auditor is required to place the same upon the tax duplicate for collection."

The said 1934 opinion held, as disclosed by the syllabus:

> "There are no statutes in Ohio authorizing either a city to certify its delinquent water rental accounts to the county auditor to be collected in the manner of real estate taxes, or authorizing a county auditor to enter such rental accounts upon the tax list and duplicate of real estate taxes when so certified."

It will be seen from the syllabus of the 1934 opinion that only a city's authority to certify delinquent water rentals to the county auditor for the collection by the county treasurer was involved. Such opinion reviewed the 1929 opinion, and affirmed the holding of the first paragraph of the syllabus of such 1929 opinion. On the other hand, the 1929 opinion clearly showed that the provisions of the statutes were different with respect to villages, and that consequently, under the express stipulations of section 4361, General Code, a village had authority to certify delinquent water rentals to the county auditor for collection by the county treasurer. While the 1929 opinion did not discuss the question of certification of delinquent electric light bills by villages, the same reasoning is equally applicable, as the language of Section 4361, General Code, places delinquent electric light accounts in exactly the same situation as delinquent water rentals.

Since the rendition of the foregoing opinions, however, the Supreme Court of Ohio has decided the case of *Hohly, Director, et al.,* vs. *State, ex rel.,* 128 O. S. 257, which case, although involving a city, undoubtedly laid down a principle of law which would apply equally as well to a village and which principle affects your first specific question.

In said Hohly case the Supreme Court held in its short journal entry opinion:

> "Neither Sections 3957 and 3958, General Code, nor Sections 41 and 1415 of the Code of 1919 of the city of Toledo, Ohio, create nor authorize the creation of a lien upon real property for charges for water supplied by such city to the premises of defendant in error."

Sections 3957 and 3958, General Code, mentioned in the foregoing Supreme Court case, provide:

> "Sec. 3957. Such director may make such by laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the water works. Such by laws and regulations shall have the same validity as ordinances

when not repugnant thereto or to the constitution or laws of the state."

"Sec. 3958. For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

It will be noted that the language of Section 3957, General Code, specifically states that a city director of public service may make such regulations as he deems necessary for the management and protection of the waterworks. Section 4361, General Code, mentioned in your communication, reads:

"The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employees and agents. The board of trustees of public affairs may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such water works, plants and public utilities, of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power, or gas, and, when such rents are not paid, such trustees may certify the same over to the auditor of the county in which such village is located to be placed on the duplicate and collected as other village taxes or may collect the same by actions at law in the name of the village. The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the

director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code, and all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

Obviously the second sentence of the foregoing section reads very similarly to Section 3957, General Code. Hence if, as the Supreme Court held, the language of Section 3957, General Code, did not authorize the creation of a lien, it must follow that the language of the second sentence of Section 4361, General Code, does not authorize the creation of a lien by rule of a village board of trustees of public affairs.

However, the latter portion of Section 4361, General Code, does authorize the creation of a lien by the language permitting the certification of the delinquent rental charges to the county auditor for collection as other village taxes.

Thus, while a village may no longer, since the decision of the Hohly case (April 11, 1934) create a lien upon property for delinquent water rentals and electric light bills, by the enactment of a rule by the board of trustees of public affairs, such village may, as before such decision, continue to create a lien on property for delinquent water rentals and electric light bills by certification to the county auditor under the provisions of the latter part of Section 4361, supra.

In other words, no lien can be created on property for delinquent bills until the moment said bills are certified to the county auditor.

Therefore, in specific answer to your first question, I am of the opinion that the board of trustees of public affairs did not by their rule create a lien upon the property supplied with such water and electricity services when the charges for such services became due and were unpaid, but that such board may legally certify the delinquent charges to the county auditor and a lien attaches to property at the moment of certification.

Coming now to your second specific question, your attention is directed to the case of *Lewis, Auditor,* vs. *Bell,* 8 Ohio Law Abstract, 625, decided by the Court of Appeals for Warren County on February 24, 1930. The syllabus of such case reads:

"Lien for light and gas rents can be created by a Board of Trustees of Public Affairs, but if such lien is not perfected at the time the property passes into the possession of a subsequent pur-

chaser, no lien can thereafter be created upon such premises. Mere accumulation of unpaid bills does not become a lien by operation of law, but requires a perfecting of the lien by certification."

An examination of the statement of facts as set forth in the report of the case, preceding the opinion of Hamilton, J., shows that the village of Lebanon, Ohio, was involved and the court gave consideration to the provisions of Section 4361, General Code. It further appears from such statement of facts, setting forth in substance the answer to the petition, that the board of trustees of public affairs had furnished light and gas to the property of plaintiff, that repeated demands had been made by them upon the owner of the premises (the plaintiff) and *the occupant thereof* for payment of such rentals when due, and when such were not paid, said board certified the delinquent rentals to the county auditor. From further facts brought out in the opinion of the court, it appeared that the plaintiff was not the owner of the premises sought to be subjected to the payment of the claim at the time the rentals accrued, except a small part thereof.

The plaintiff had sought by her petition an injunction against the county auditor placing the sums upon the duplicate against her property, claiming such was unauthorized by law and would contravene her constitutional rights. Such petition stated that plaintiff was a non-resident of Ohio; that she became the owner of the premises on July 14, 1924; that the certification was made on February 13, 1929; that practically all of the claim had accrued prior to the said plaintiff becoming the owner of such premises; and, further, that no notice was given her of the claim or the intention to certify it to the county auditor.

To the answer of Lewis, Auditor, the plaintiff filed a demurrer, and the lower court sustained the demurrer to the answer. Error was prosecuted to the lower court's ruling on the demurrer to the answer. It was stated in the opinion of the court, at page 625, as follows:

"The question therefore turns on whether or not a Board of Trustees of Public Affairs of a village, which manages, controls, and conducts the water works, electric light and artificial gas plant of the Village, can perfect a lien upon the premises to which the same have been furnished, by certification to the Auditor of the amount so furnished, under favor of 4361 G. C.?

If, under 4361 G. C., the trustees of Public Affairs can create a lien on real estate to collect rental for light and gas furnished to said premises, *whether used by the owner or other*

persons in possession, the demurrer to the answer should have been overruled." (Italics the writer's.)

After quoting at length from the opinion of the Supreme Court in the case of *Western Reserve Steel Company, et al.,* vs. *Village of Cuyahoga Heights, et al.,* 118 O. S. 544, the court said at page 626:

"So it will be observed that in the decision in the case of Steel Co. v. Village of Cuyahoga Heights, supra, the Supreme Court recognized that a lien for water rents, in this case, light and gas rents, could be created by a Board of Trustees of Public Affairs, but that if such lien were not perfected at the time the property passed into the possession of a subsequent purchaser, that no lien could thereafter be created upon such premises, and, further indicates that notice was necessary. This decision further holds that the mere accumulation of unpaid bills for water rent, in this case, gas and light does not become a lien upon the premises by operation of law, but requires a perfecting of the lien by the Board of Trustees by certification.

The petition in the instant case states that *the plaintiff was a non-resident of the State of Ohio,* and that she had no notice or opportunity to be heard with reference to the claim, pleads the bar of the statute, sets up the defense that she became the owner after the rentals in question had accumulated, and other matters.

The answer claims repeated demands upon the owner of the premises, *or upon the occupant thereof.*

This indicates disputed questions of fact, put in issue by the petition and the answer. The answer, therefore, presented a defense, and the court erred in sustaining a demurrer thereto.

While reversing the judgment, for error in the sustaining of the demurrer to the answer, it may be well to state that under the law there can be no perfecting of a lien for any claim arising prior to the taking of the title by the plaintiff on April 14, 1924.

The judgment will be reversed, and the cause remanded for further proceedings according to law." (Italics the writer's).

From the foregoing, it can be observed that the premises of the plaintiff, the owner, were occupied by an occupant other than the said owner. In fact, the petition stated that the plaintiff, the owner of the premises, was a non-resident. While it does not appear specifically that the occupant had the status of a *tenant,* yet the second paragraph of the opinion clearly recognizes that the occupant was a person, other than the owner, lawfully in possession, by some claim of title, and a *tenant* is defined by Webster's

Twentieth Century Dictionary to be "a person who holds or possesses lands or tenements by any kind of title."

By holding as it did, that the demurrer to the answer should have been overruled, and specifically stating, in the next to the last paragraph of the opinion that under the law there can be no perfecting of a lien for any claim arising prior to the taking of title by the plaintiff on April 14, 1924, thereby giving a clear implication that a lien could have been perfected against plaintiff's premises for services to the occupant (the tenant) made after her (the plaintiff's) taking of title on April 14, 1924, it seems clear that the court considered that a board of trustees of public affairs could legally create a lien, for delinquent charges incurred by a tenant of property, against the property of the owner, providing such charges were for services after such person became the owner of the property, and notice was given to such owner of the claim and intention to make certification to the county auditor.

Relative to the right of the legislature to provide that water furnished a tenant of a property owner shall constitute a lien against the premises of such owner, I direct your attention to the case of *Loring* v. *Commissioner of Public Works,* 264 Mass., 460, in which it was said at page 465:

> "It must be regarded as settled that in general the Legislature may provide for the establishment and enforcement of liens upon the real estate to which water is furnished, *even on the order of tenants and in the absence of an express direction by the owner.* This is on the broad ground that such liens may aid in providing an adequate supply of water at reasonable rates and hence may be an appropriate element in a scheme of legislation for a public water supply. Turner v. Revere Water Co. 171 Mass. 329. Provident Institution for Savings v. Mayor & Aldermen of Jersey City, 113 U. S. 506. Dunbar v. New York, 251 U. S. 516. The subject in its main aspects has been so thoroughly discussed in these decisions that it now would be futile to do more than refer to them. The general current of authority in other states is in harmony. Atlanta v. Burton, 90 Ga. 486. Ford Motor Co. v. Kearny, 91 N. J. Law, 671. State v. Water Supply Co., 19 N. M. 27, 32, 33. East Grand Forks v. Luck, 97 Minn. 373. Girard Life Ins. Co. v. Philadelphia, 88 Penn. St. 393. Dillon on Municipal Corp. §1323." (Italics the writer's.)

See also *City of Bucyrus* v. *Sears,* 34 O. App., 450; 122 O. S. 613.

When the foregoing case in 8 Ohio Law Abstract is considered, it seems obvious that our court considered that the legislature had provided

by the language of section 4361, supra, that there is a lien against the property of the owner for water services furnished to the tenant of such property owner.

Hence, I am of the view, in specific answer to your second question, that delinquent water rentals and light bills due from a tenant may be legally certified to the county auditor to be collected as taxes on the property of the landlord, providing such landlord was given proper notice of the claim and intention to make certification and such claim accrued after the landlord became owner of the property. I assume that in the instances you describe in your communication, the owner was given proper notice before certification and the bill accumulated after the owner took title to the property, if such property changed hands.

Coming now to your third question, in view of the conclusion in your second question, based on the assumptions noted, it follows that an answer thereto is rendered unnecessary.

Respectfully,
JOHN W. BRICKER,
Attorney General.

6215.

APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $23,000.00.

COLUMBUS, OHIO, October 17, 1936.

Industrial Commission of Ohio, Columbus, Ohio.

6216.

APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $17,000.00.

COLUMBUS, OHIO, October 17, 1936.

Industrial Commission of Ohio, Columbus, Ohio.